- **Closed Session Procedures** – *General*
  - ◇ Practices in violation
    - after-the-fact addition of reason for closed session

- **Closed Session Procedures** – *Written Statement*
  - ◇ Practices in violation
    - failure to prepare written statement before closing meeting

- **Exceptions Permitting Closed Sessions** –
  - ◇ *Business Relocation, §10-508(a)(4)*
    - purpose and application of exception, generally
    - approval of legislation, outside exception
    - land use or financing matter that might generate future proposals from businesses, outside exception

- **Exceptions Permitting Closed Sessions –**
  - ◇ *Marketing of Public Securities, §10-508(a)(6)*
    - discussion of legislation on size of taxing district, outside exception

***Topic headings correspond to those in the Opinions Index (2010 edition) at http://www.oag.state.md.us/opengov/openmeetings/appf.pdf**

July 25, 2013

Re: Board of Finance of Baltimore City
(Stephen Janis and Melissa Roeder (Fox45)
and Luke Broadwater (The Baltimore Sun), Complainants

We have considered the complaint of Stephen Janis, Melissa Roeder and Luke Broadwater ("Complainants") that the Board of Finance of Baltimore City ("Finance Board") violated the Open Meetings Act ("the Act") by excluding them from its May 20, 2013 meeting and by failing to follow the procedures set forth in the Act for closing the meeting. In the closed session, the Finance Board considered whether to grant its approval for the introduction of legislation to authorize the financing of a real estate development project through the City's Tax Increment Financing ("TIF") Policy.

We conclude that the Finance Board violated the Act by closing the meeting to the public before making the disclosures required by the Act and

by discussing matters that did not fall within the statutory provisions, or "exceptions," that the Finance Board had initially cited as authority for excluding the public. We also conclude that not all of the discussion fell within the exception that the Finance Board later asserted as a basis for excluding the public. From the information provided to us, we find that the public was entitled to observe at least part of the Finance Board's May 20 meeting and to be apprised, in advance, of the Finance Board's reasons for closing it.

Background

A. The Finance Board

The Finance Board was established by the Baltimore City Charter ("Charter") to "advise the Department [of Finance] and exercise those powers and perform those duties provided by law." Charter Art. VII, § 19. The Finance Board consists of five members—the Mayor, the Comptroller, and three others—and must designate a clerk to "keep its accounts and a record of its proceedings." *Id*., § 20(a), (c). The Mayor serves as the Finance Board's President. *Id*. When the Mayor is absent, the Vice-President "shall exercise the powers of the Board President." *Id*., § 20 (b).

As an entity created by the Charter, the Finance Board is a "public body" subject to the Open Meetings Act. *See* State Government Article ("SG") § 10-502(h) (2) (iii).

B. The City's procedure for the approval of TIF projects, and the Finance Board's role in it

The allegations necessitate a general understanding of the TIF financing method authorized by Art. II, § 62 of the City Charter and the role the Finance Board plays in the City's legislative approval of the issuance of TIF bonds. "In general," the Finance Board's Tax Increment Financing Policy (January 23, 2012) explains,

> TIF Bonds are special obligations of the City secured by the incremental increase in property taxes resulting from the proposed improvement. The City utilizes this financing option by designating within its borders a TIF district. The base property valuation (assessable base) is then established and certified, and the property taxes from that assessable base continue to be collected and used for general governmental purposes. As the assessed valuation within the district increases, the taxes derived from the increased valuation (tax increment) pay debt service on the bonds used to fund TIF project costs within the district. When the TIF debt is repaid, the district is dissolved and the taxes collected from the increased assessed valuation flow directly to the City's general fund.

Policy, p. 3. Logistically, the tax increment is paid into a special fund. The TIF bonds are to be "payable from and secured by" that fund, and may also be paid by other means, including methods that might be established by an agreement with the developer. Art. II, § 62(a). In the event that the TIF project does not result in a higher tax base for the district and thus does not generate a tax increase sufficient to pay the debt service, the City "in most cases" will require that the bonds be secured by a tax levied in the district to make up the shortfall. To accommodate that possibility, the City creates a special tax district for the project. Policy, p. 2.

The Policy establishes a four-step process for the Finance Board's approval of a TIF project. The first step, in which the Finance Board does not play a role, consists of the development of the plan and proposal by the appropriate City coordinating agency, such as the Baltimore Development Corporation ("BDC") or Department of Housing and Community Development, for presentation to the Finance Board in the second step.

In the second step, the proposed TIF is presented to the Finance Board for its "conceptual approval," for the purpose of "confirm[ing] that the proposed TIF will be consistent with the City's policies regarding TIFs early in the process before significant City efforts are expended preparing legislation and moving forward." Policy, p. 7. The Policy states, "[a]s the City's financial advisor, the Board of Finance is responsible for approving all TIF proposals prior to consideration by the City Council or Board of Estimates." Policy, p. 3.[1] The Policy spells out seven criteria for the approval of a TIF proposal. Those criteria include whether the project "[a]dvances the City's strategic land use, economic development and public improvement goals," whether it "[i]s not feasible and would not be completed (within a reasonable time frame) without the proposed TIF assistance ('but for' test) and assistance is limited to the amount required to make the project feasible," whether it "[s]atisfies economic and risk requirements," and whether it "[w]ill create positive tax revenues to the City, taking into consideration the costs of public services to be provided . . . and the tax increment revenues that will be required to pay the bonds." Policy, p. 1. Under the Policy, the Finance Board "reserves the right, at its sole discretion, to amend or waive certain provisions in these guidelines, when it is determined to be in the best interest of the City."

The step two submissions must contain information responsive to 13 topics. Policy, pp. 8-11. Among other things, the coordinating agency must describe the project site, both in terms of the existing uses and the proposed uses, required governmental approvals and permits, intended financial arrangements, consistency with the City's "economic

[1] According to the Policy, "TIF debt is considered by the rating agencies as debt of the City, and included in the calculation of the City's tax supported debt burden." Policy, p. 4. The Finance Board issued the Policy in part "to ensure that TIF projects, when added to other tax supported debt, do not negatively impact the City's general debt ratings." Policy, pp. 2, 4.

development and public improvement objectives," evidence to establish "why the project would not occur 'but for' the TIF funding," and "public purpose benefit." Policy, pp. 9-10. The Policy states that the need for information may vary according to the project.

In the third step, the "proposed legislative package creating the TIF (and related special taxing district" and updates on the application are presented to the Finance Board "for approval." The coordinating City agency is then to schedule and obtain approval from the City's Board of Estimates and City Council "as required." Policy, p. 7. The legislative package generally consists of: (1) an ordinance that designates the development district, (2) an ordinance that creates the special fund for receipt of the tax increment; and (3) an "enabling ordinance" that specifies the maximum principal amount of the bonds to be issued and that describes the project and the pledge of the tax increment to the special fund. The enabling ordinance further may authorize the Finance Board "by resolution to specify and prescribe" a number of terms as the Finance Board "deems appropriate to effect the financing or refinancing" of a TIF project.

The fourth step occurs after the enactment of the legislative package. That step comprises the submission, for approval by the Finance Board, of the documents authorizing the issuance of the TIF bonds. The submissions are to include financial projections, including a "description of the risks associated with the project and how those risks are mitigated." Policy, p. 7. If so authorized by the enabling ordinance, the Finance Board may prescribe terms such as the principal amount, interest rate, and terms of sale and issuance of the bonds, and "the provisions of any development agreement to be executed by the Mayor and City Council of Baltimore and any person in connection with the issuance of such bonds." Art. II, § 62 (d), (e), (f).

The Finance Board's Policy thus gives the Finance Board an integral role in the legislative process by which the City authorizes the issuance of TIF bonds and then in the determination of how, and on what terms, those bonds are to be marketed.

C. The May 20, 2013 meeting – facts and allegations

A quorum of the members of the Finance Board met on May 20, 2013. The Finance Board's Clerk also attended. In the Mayor's absence, the vice-president presided. According to the Finance Board's draft minutes of the open part of the meeting, the members addressed several matters before turning to an item described as "Consider Legislation for the Harbor Point Tax Increment Financing." The draft minutes give this account of the way in which the meeting was closed:

> [The Clerk], in accordance with Md. Code, State Government, § 10-508(a) (4) and (14) requested the Board consider a motion for a closed door session to discuss the approval of legislation for the Harbor Point Tax Increment

> Financing. The Board approved the closed session on the motion of Mr. Black, seconded by Mr. Silverstein. Mr. Broadwater objected to the closing of the meeting. The meeting was closed to the public. Ms. Roeder, Mr. Janis and a cameraman then entered the conference room and objected to the closing of the meeting. [The Clerk] explained that if the Board of Finance approves the submission of the TIF legislation to the City Council, the public will have full public access to information during the City Council's public hearing process. A "Written Statement for Closing a Meeting under the Open Meetings Act" is attached hereto . . . ."

According to the Finance Board, the written statement to which the draft minutes refer was "executed" after the meeting. The written statement bears the Clerk's signature on the line provided for the signature of the presiding officer. The City states that the Clerk had "made the statement on the record although he neglected to fill out a written form."

The written statement is not consistent with the draft minutes. SG § 10-508(a) (14), the exception cited in the draft minutes as a basis for closing the meeting, pertains to the contents of a bid or proposal and other matters related to a competitive procurement. On the written statement, the Finance Board instead claimed SG § 10-508(a)(6), which permits a public body to close a meeting to "consider the marketing of public securities." The Finance Board cited SG § 10-508(a)(4) both times; that exception permits a public body to close a meeting "to consider a matter that concerns the proposal for a business or industrial organization to locate, expand, or remain in the State."

The written statement provides the following information under the heading on the form for "reasons for closing and topics to be discussed":

> (4,6) For the consideration of the conceptual approval of the Harbor Point Tax Increment financing including legislation prior to introduction to the City Council authorizing (1) an amendment to the Harbor Point Development District, (2) creation of the Harbor Point Special Taxing District and levy of a special tax, and (3) issuance of special obligation bonds.
>
> (4, 6) The discussion included issues relating to the issuance of tax increment debt securities and the expansion and relocation of Exelon and other businesses within Baltimore City.

It thus appears that the meeting involved both the second step of the TIF process—conceptual approval—and the third step—the approval of the legislative package.

The Finance Board's response describes the topics discussed this way: "Representatives of the Baltimore Development Corporation and

Municap, Inc., public finance consultants, presented financial data and projections relating to the proposed project. . . . The financial feasibility study and preliminary financial projections discussed at the meeting contain sensitive financial data . . . ." The response also states that the Clerk cited exception (a) (14) in error and that exception (a) (6) was the applicable exception.

The Finance Board provided us with the sealed minutes of its closed session.[2] The closed minutes confirm the Finance Board's disclosure that it discussed conceptual matters relating to the financing of the project and also approved the introduction of the three bills needed to implement the financing. The Clerk introduced the proposed legislation, gave the history of the ordinance that had established the development district that would be altered by one of the bills, explained BDC's approval of the TIF project application, referred to the financial projections and other application documents provided by BDC, and summarized the changes that had been made to the development site plan since it was last been presented to the Finance Board. The infrastructure needs of the site and project phases were explained, and questions were asked about various assumptions contained in BDC's analysis. The meeting was attended by Finance Board members and staff and BDC staff and consultants. From the draft minutes, it does not appear that any members of the general public were permitted to attend.

Shortly after the meeting had adjourned, the Finance Board's counsel sent to Complainants Broadwater and Janis an e-mail in which she stated that the meeting had been closed under exceptions (a)(4) and (6). The e-mail did not contain any other information.

The Complainants allege that they were improperly excluded from the closed session. Complainants Janis and Roeder allege that the relationship of exceptions (a) (4) and (6) to the matter at hand was "tangential at best," that the Finance Board closed the session without issuing a written statement, that the Finance Board's discussions involved tax and land use policy, issues that should have been discussed in an open meeting, and that the meeting was closed to members of the press, but not to others. Complainant Broadwater alleges that exceptions (a) (4) and (6) would only apply if they interpreted overly broadly. He alleges that Exelon was the business being "relocated" and that it had "already committed to building a new regional headquarters in Harbor Point."

D. The TIF legislation introduced in the City Council on June 3, 2013

The TIF legislative package—Council Bills Nos. 13-0232, 0233, and 0234—was introduced in the City Council on June 3, 2013. On June 18,

[2] The Act entitles us to review sealed minutes pertinent to a complaint, but we are to keep the contents confidential. SG § 10-502.5(c)(3)(iii). We refer only generically to the topics described in sealed minutes.

the bills' sponsor, Baltimore Development Corporation ("BDC"), submitted to the Council a memorandum and various documents in support of the legislation. Already pending in the Council, according to BDC, was Bill No. 13-0195, a land use bill proposed to establish a Planned Unit Development ("PUD") that would "authorize the owner of the property to develop the site as an approximately 3,020,000 square-foot mixed-use neighborhood."

BDC's memorandum summarizes each bill in the June 3 package. Bill No. 13-0232 would enlarge the development district created in 2010 "to include additional properties," "change certain parcel references due to a subdivision action," and "repeal and clarify certain provisions related to state obligations." Bill No. 13-0233 would establish a special tax district to guarantee the City's ability to repay the holders of TIF bonds if the tax increment were insufficient to meet the debt service on the TIF bonds.

Bill No. 13-0234, the bond ordinance, would "authorize the City, on terms to be approved by the Board of Finance, to issue [TIF] bonds, in an amount not to exceed $125,000,000 for the purpose of financing necessary and critical infrastructure improvements and costs of bond issuance" related to the project, pledge the anticipated tax increment and special tax revenues to the repayment of the TIF bonds, and authorize the Finance Board to specify the terms of the TIF bond issuance, sale, and payment. Section 9 of the bill authorizes the Finance Board to "prescribe or approve by resolution . . . the rate or rates of interest the Bonds are to bear or the method for determining the same, provided that the rate or rates of interest shall not exceed a maximum of 7%." Bill No. 13-0234. In a June 4, 2013 memorandum on that bill, the Finance Board's Clerk stated to the President and Members of the City Council: "The Board of Finance has considered and approved the [TIF] Bond request" and "approved the submission of this legislation to the President and members of the City Council of Baltimore."

Among the documents submitted to the City Council were the "TIF financial model prepared for the Board of Finance," a "Fiscal Impact Analysis," and a "Harbor Point Total Project Cash Flow," described as the City's financial consultant's "analysis of the developer return on its equity investment, both with and without TIF." [3] The TIF financial model bears a date of May 17, 2013. Its cover page bears various "assumptions," including "Developer Held Bonds." The BDC memorandum explains: "The Bonds are anticipated to be issued initially directly to the Developer as a private placement issuance and will be remarketed to public bond purchasers once significant components of the Project have been completed

[3] Complainant Janis provided us with these documents shortly after BDC submitted them to the City Council. The Finance Board urges us to disregard them as "not material to the decision before the [Compliance Board] relating to conduct of the May 20, 2013 meeting of the Board of Finance." We do not disregard them; they clearly bear on the Finance Board's role in the legislative process for the TIF bills at issue here.

and Tax Increment Revenues have been received." As we understand it, the "market" planned for the TIF bonds is the developer of the project.

Discussion

The complaints raise three separate questions: (1) whether the Finance Board closed the May 20 meeting to the public in accordance with the procedures mandated by the Act; (2) whether the discussion fell within the exceptions claimed by the Finance Board before it closed the meeting; and (3) whether the discussion would have fallen within the exception the Finance Board later stated that it had intended to claim.

A. Whether the Finance Board closed the meeting in accordance with the procedures mandated by the Act

The Act requires a public body's presiding officer to perform two tasks before the public body meets in closed session. First, the presiding officer "shall conduct a recorded vote on the closing of the session." SG § 10-508(d) (2) (i). The draft minutes reflect that the presiding officer performed that task.

Second, the presiding officer "shall make a written statement," or "closing statement," that states the "reason for closing the meeting," including a citation of the applicable statutory exception and a list of the topics to be discussed. SG § 10-508(d)(2)(ii). The Finance Board concedes that no written statement was prepared before the closed session and thus concedes that it violated the section.

That is where our discussion might have stopped; usually, when a public body acknowledges a violation and undertakes to address the problem, we have little to discuss. Here, however, the Finance Board's response suggests that it believes that its oral disclosures met the objectives of the Act and that the violation was only one of form. The response asserts that the Clerk's oral announcement "substantially complied with the material requirements of Section 10-508 of the Act," ascribes to the Clerk the "neglect" to make the written statement, describes the violation as "technical," and suggests that its post-meeting issuance of a written statement "ensure[d]" that the Finance Board's conduct of business was "transparent also to members of the public who are unable to attend its meetings." In fact, neither the oral statement recounted in the draft minutes nor the *post hoc* written statement establishes substantial compliance with the Act. Because these assertions do not assure us that the Finance Board fully understands how and why to comply with the "written statement" requirement of the Act, we elaborate.

The Act requires the presiding officer to "make a written statement" that specifies both the "reasons for closing" and the topics discussed. SG § 10-508(d)(2)(ii). As might be inferred from the fact that the General Assembly assigned to the presiding officer the duty to make the written statement, the performance of that duty is not a mere formality. A properly-completed written statement serves to prompt "each member of

the public body, before voting, to consider whether the reason is sufficient to depart from the Act's norm of openness." 4 *OMCB Opinions* 46, 48 (2004). It "helps members of the public who will be barred from the closed session to understand that this exception to the principle of openness is well-grounded." It serves as an accountability tool, because it enables the public to compare the pre-meeting disclosures with the minutes summarizing the actual conduct of the meeting and thereby to assess whether the discussion stayed within the exceptions that the public body had claimed. 4 *OMCB Opinions* 48. And, in the event that a complaint is filed, it tells us that the members of the public body considered the legality of closing the meeting and gives us their reason at the time for doing so. An after-the-fact justification for closing a meeting is not a good substitute for that information.

The public body's reasons for excluding the public should be apparent from the written statement itself. *See, e.g.*, 4 *OMCB Opinions* 49 (stating that the fact that the reason for closing "may be apparent upon reflection is no excuse for omitting it"). Sometimes, a valid reason for closing a meeting can be discerned from the topic discussed, as when a public body closes a meeting under SG § 10-508(a)(1) to discuss discipline matters respecting individual employees. In those circumstances, we have not found a public body in violation for merely stating the "topic." *See, e.g.*, 4 *OMCB Opinions* 188, 196 (2005). Either way, the reason must be articulated. Here, the draft minutes show only that the Clerk cited two exceptions and stated that the meeting would be closed to discuss "the approval of legislation for the Harbor Point Tax Increment Financing." That description provides no information about the Finance Board's reasons for precluding the public from observing the discussion. Indeed, nothing before us shows that the members actually considered, before they voted on the motion to close, why they were departing from the norm of openness. The Finance Board thus did not substantially comply with the statutory requirement that it articulate its reasons for excluding the public.

As noted above, the Act requires the presiding officer to make the written statement. SG § 10-508(d)(2). We deem that requirement to have been met when the presiding officer, at the time of the vote, either prepares the statement or ratifies a pre-prepared statement as still accurate; either way, the presiding officer will go into the closed session with a precise understanding of the topics that the members may discuss there. 7 *OMCB Opinions* 226, 227 (2011). The public body, not its staff, is answerable for compliance with the Act. *See* 7 *OMCB Opinions* at 227 ("Neither the presiding officer's duty to make the closing statement nor the members' duty to confine their closed-session discussions to the listed topics may be delegated to staff."). Under the Act, the responsibility for making the final written statement did not lie with the Clerk, who is not a member of the Finance Board.

We encourage the Finance Board *not* to view the written-statement requirement as a merely "technical" duty to be performed by its Clerk alone. Properly used, the written statement can both prevent violations and

shield the public body from the suspicion that its closed sessions are illegal. When, as here, the Finance Board's Policy makes its approval of legislation part of the legislative process, and the discussion involves information that will be publicly presented to the City Council at the next step, the public might fairly question the need for secrecy. The Act entitles the public to a written statement that provides the answer.

B. Whether the discussion fell within the exceptions claimed by the Finance Board before it closed the meeting

When a public body is performing a function subject to the Act, the discussion in the closed session must fall within the scope of the exception and topics that the presiding officer has cited on the closing statement. *See* SG § 10-508(b), (d) (restricting discussions to those within a statutory exception; conditioning the closed session on disclosures of the topics and claimed statutory authority).

The Finance Board asserts generally that exception SG § 10-508(a)(4), the "business location" or "relocation" exception that it claimed orally, applied to its "discussion of the tax increment financing, which concerns a subsidy directly related to the proposal for businesses to locate in the Harbor Point site."[4]

In 2011, we issued an opinion in which we reviewed all of the matters in which we had addressed the business relocation exception. We noted that we had never stated that the exception "could shield decisions and deliberations on pending legislation from public view." We nevertheless expressed concern that our opinions had been construed to allow substantial closed-meeting deliberations on legislation. 7 *OMCB Opinions* 148, 162 (2011). We therefore reiterated the purpose and limits of the exception. As relevant here, we explained:

> We begin with the principle that the Court of Appeals has stated variously as part of the "touchstone" or "heart" of the Act: "It is . . . the deliberative and decision-making process in its entirety which must be conducted in meetings open to the public since every step of the process, including the final decision itself, constitutes the consideration or transaction of public business." . . . *J. P. Delphey Limited Partnership v. Mayor and City of Frederick*, 396 Md. 180, 200, 913 A.2d 28 (2006) . . . . The Court . . . reiterated . . . that "one purpose of the government in the Open Meetings Act was to prevent at nonpublic meetings the crystallization of secret decisions to a point just short of ceremonial acceptance." . . .

[4] The Finance Board states that the oral citation to exception (a)(14) was "in error," and the exception in fact bears no apparent relation to the topics mentioned in the sealed minutes.

> As the Court explained in *Delphey*, however, the Act contains exceptions. So, we look also to the purpose of [the business relocation] exception, which we must construe strictly and in favor of open meetings. §10-508 (c). In 1 *OMCB Opinions* at 29, we referred to the Legislature's "understanding that some businesses might be deterred from making proposals about relocation, expansion, or retention of an existing facility if all such discussions were open to public view." In 2 *OMCB Opinions* at 82, we stated that the exception would apply "[I]f the overall discussion concerned a business's possible relocation to a site in Hyattsville under circumstances in which the business insisted on the need for confidentiality." We have thus interpreted the exception to address the business's interest in protecting its own identity and information. We have also extended the exception to matters that could not have been "practically separated and discussed outside of the context of the specific business proposal," 6 *OMCB Opinions* at 194, and to the applicability of an existing law in a discussion "tied to" the proposal.
>
> Here, the formulation of the County's policy on permissible uses in the 1,100-acre Industrial District did not fall into the category of confidential information belonging to [the business that had made the proposal]. Even if such legislation could be deemed to embody private information (a proposition we doubt), we note that [the business] itself did not appear to seek secrecy concerning its interest in relocating to the County. . . .
>
> * * *
>
> We shall therefore draw the line for the "business relocation" exception in the same place we have drawn it for other exceptions and consistently with the principles set forth by the Court of Appeals: when a discussion strays beyond the specific proposal and into even the preliminary stages of a "legislative response," the public body must conduct that discussion in an open meeting.

7 *OMCB Opinions* at 162-65 (edited).

Accordingly, we will look to whether the Finance Board's overall discussion concerned a business's possible relocation to the site under circumstances in which the business insisted on the need for confidentiality in order to protect the business's own identity and information. Next, assuming that the exception applied to some matters, we will look to whether the discussion of other matters could have been severed from the business location matters and discussed publicly. We then look to whether the discussion had traveled beyond a specific proposal to locate or relocate and into the preliminary stages of a legislative response.

With respect to the proposing business's need for confidentiality to protect its own identity and information, the draft minutes show that the Finance Board closed the meeting to consider a developer's proposal, offered by BDC, that the Finance Board approve TIF legislation for a project that had already been the subject of land use legislation and a prior TIF ordinance. There has been no suggestion that the developer wished to keep its own identity and intentions for the property secret, or that that information was secret. If the Finance Board's discussions about financial projections or the slides that were shown would have disclosed confidential information about the developer's prospective tenants' identities and information, the Board might have properly excluded the public from that part of the discussion. In fact, the Finance Board identified one of the prospective tenants in the closing statement it issued after the meeting, and Complainant Broadwater points out that the entity's identity had already been made public. In any event, from the information provided to us, it does not appear that the Finance Board considered proposals made by businesses whose identities and information were confidential. It does appear that the Finance Board heard information that was already public or did not belong to the developer, such as the history of the project and proposed change in the size of the tax district since the Finance Board and City Council had last considered the matter. We find that the business relocation exception did not apply to the entire discussion. We are unable to determine whether it applied to any of the discussion.

As for whether some matters could have been severed from any confidential matters and discussed publicly, the draft minutes reflect that the meeting included discussions about the history of the project, the characteristics of the site, the changes that had been made in the master plan for the site, and approval of the proposed legislation. While the Finance Board has asserted generally that the topics at the meeting fell within the business relocation exception, it has not explained why it could not have discussed these particular matters publicly, and we are addressing these complaints without the benefit of a written statement that would have reflected the members' reasons, at the time, for excluding the public from those discussions. The submissions do not suggest that these matters were so inextricably bound to any topics that might have fallen within the business location exception as to have fallen within that exception.

With respect to whether the discussion constituted the early stages of a legislative response, the Finance Board states that "the City's Tax Increment Financing Policy requires presentation of the proposed TIF and related legislative package to the Board of Finance to ensure that the request complies with its policies before legislation is introduced to the City Council." The City has thus assigned to the Finance Board a role in the legislative process, which, for this project, had progressed to the point where the Finance Board was meeting to consider its approval of three bills. One of the bills, the change in the development district, proposed to amend earlier legislation, and all of the bills were introduced within three weeks of the May 20 meeting. We conclude that this public body's

deliberations on the proposed legislation had progressed well past proposals to locate in the City and fell within the broader question of a legislative response.

In sum, we must construe the business relocation exception strictly. We do not construe it broadly to apply every time a property owner, its developer, or a coordinating agency seeks legislation to enable a land use or financing that might in turn generate proposals from new businesses. Further, we have not, and still do not, construe the exception to extend to steps in the legislative process. Even when the exception applies, it extends to other topics only when those topics are so intertwined with the information of the proposing business that they cannot be discussed separately. Here, the draft minutes, especially read in conjunction with the City's broad dissemination of the same information soon thereafter, show that the members considered matters that did not appear to implicate the exception.

To comply with the Act, the Finance Board should address, in detail, whether each topic it will discuss falls within a statutory exception, and, even if so, whether there is a reason to exclude the public. Before voting to close a meeting under the business relocation exception, the members should analyze whose proposal they are addressing, whose information they seek to address, and whether that information is actually confidential. Then its presiding officer should make, or ratify, a written statement. In doing so, the presiding officer should aim for the basic goal we stated in 4 *OMCB Opinions* 46, 49 (2004): "Someone reading the written statement ought to have the answer to two questions: what are [the members] planning to talk about ('topics to be discussed'), and why should this topic be discussed in closed session ('the reason for closing the meeting')." During the closed session, the presiding officer and members should confine the discussion to the topics stated on the written statement and re-open the meeting if they need to stray from those topics or the need for confidentiality dissipates.

C. Whether the discussion fell within the "public securities marketing" exception claimed by the Finance Board after it closed the meeting

The Finance Board's counsel informed Complainants Janis and Broadwater soon after the meeting that the "meeting was closed today pursuant to [SG] Section 10-508(a)(4) . . . and Section 10-508(a)(6) to consider the marketing of public securities." The statement thus substituted exception (a)(6) for exception (a)(14), the exception on which the Finance Board had relied in voting to exclude the public.

The Finance Board violated the Act to the extent that it discussed the marketing of public securities in a closed session without first voting to close the meeting on the basis of that exception and without disclosing the exception, the topic and the reasons for confidentiality. That leaves the question of whether the meeting could have been closed under the public securities marketing exception. The City contends that the "financial

feasibility study and preliminary financial projections discussed at the meeting contain sensitive financial data which, if made public at this time, could adversely impact the marketability of the City's future bond issues for the Harbor Point project."

We are unable to assess the City's contention that the "sensitive financial data" might "adversely affect the marketability" of the TIF bonds. We note that the May 20 meeting occurred at step 3 of the TIF approval process—a step at which the City had yet to adopt the enabling ordinance to authorize the issuance of any TIF bonds to be marketed. It also appears from non-confidential documents submitted to us that the proposed initial market is the developer, which itself would hold the bonds. We cannot determine whether that market would be adversely impacted by the disclosure of information about the developer's own project. We are thus unable to determine whether the financial matters discussed by the Finance Board would have fallen within the securities marketing exception had the Finance Board properly cited it.

Even so, the securities marketing exception would not have applied to everything the members discussed in the closed session on May 20. While the draft minutes show that the Finance Board was provided financial projections and engaged in some discussion of marketing matters, the group also discussed other topics, such as changes to the site map, the characteristics of the site and project, and the question of whether to approve the legislation.

In sum, we find that the Finance Board violated the Act by discussing in closed session matters to which none of the cited exceptions would have applied. We cannot determine whether the securities marketing exception would have applied to any part of the closed session.

Conclusion

We find that the Finance Board violated the Act by closing the meeting to the public before making the disclosures required by the Act. We also find that the Finance Board violated the Act by discussing matters that fell neither within the statutory exceptions that the Finance Board initially announced as the authority for excluding the public nor within the exception that it cited after the meeting. We encourage the Finance Board's stated endeavor to make the necessary disclosures about any future meetings it finds necessary to close.

Open Meetings Compliance Board

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin